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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 827

ALBERT ROVIARO, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-5a) is reported at 229 F. 2d 812.

JURISDICTION

The judgment of the Court of Appeals was entered on February 7, 1956 (Pet. App. 6a). A petition for a rehearing was denied on March 7, 1956 (Pet. App. 7a). The petition for a writ of certi-

orari was filed on April 6, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction for a violation of 21 U.S.C. 174, based upon possession of heroin which was proved by the testimony of two officers who observed petitioner handle a package of the drug, was invalid because the government was allowed to withhold the identity of an informant who was also present at the transaction but who was not called to testify.

2. Whether the trial court properly refused to order production of a report made by a narcotic agent to his superiors when the basis for the request was that a notation on the envelope in which the heroin was kept, made by an officer not present at the time, was to the effect that officer Bryson had found the narcotics, whereas the testimony of the officers at the trial was that agent Durham had first retrieved the narcotics and turned it over to Bryson.

STATUTES INVOLVED

26 U.S.C. (1952 ed.) 2554(a) provided:

> It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, ex-

changed, or given, on a form to be issued in blank for that purpose by the Secretary.

21 U.S.C. 174 provides in relevant part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. * * *
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT

In a trial without a jury before the United States District Court for the Northern District of Illinois, Eastern Division, petitioner was found guilty upon two counts of an indictment, returned September 3, 1954, charging that (1) on August 12, 1954, at Chicago, Illinois, he sold heroin to one

"John Doe" in violation of 26 U.S.C. 2554(a) (*supra*, pp. 2-3),[1] and (2) on the same date and in the same place, he knowingly received, concealed and facilitated the transportation, after importation, of heroin in violation of 21 U.S.C. 174 (*supra*, p. 3) (R. iv-vii,[2] R. 217). Petitioner was sentenced to two years imprisonment and a fine of $5.00 on each count, the sentences to run concurrently (R. 217).

1. Before trial, petitioner filed a motion for a bill of particulars (R. ix-x) requesting the name, address and occupation of John Doe, the date and time of day, and the place of occurrence by street and number, of the alleged offense. The court denied the motion (R. xii).

At trial, the government produced evidence to show that two federal narcotic agents, Durham and Fields, and two Chicago police officers, Bryson and Sims, met together with an informant known to the police for many years (R. 70, 154), but described only as "John Doe," at 75th and Prairie Avenue in Chicago on the night of August 12, 1954 (R. 15, 138, 174, 191). Doe and his Cadillac sedan were searched (R. 15, 138, 175, 192). Bryson concealed himself in the trunk of the Cadillac (R. 17, 139, 192) and Doe drove it to

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[1] Now 26 U. S. C. 4705(a).

[2] The numerals refer to corresponding but unnumbered pages attached at the beginning of the record before the transcript of proceedings.

70th Place and St. Lawrence Avenue, followed by Durham in a government car (R. 17, 175, 193). At this point, petitioner, driving a Pontiac sedan, arrived, accompanied by an unknown man (R. 19, 176, 193). Petitioner left the Pontiac and entered the Cadillac taking a seat next to the driver, John Doe (R. 19, 176, 193). The Cadillac then proceeded by a circuitous route to 74th Street near Champlain Avenue. When Durham saw petitioner alight from the Cadillac, he left his car and stood watching from a point about 100 feet away (R. 20-23). It was a clear moonlit night (between 11 and 12 p.m.) and the area was lit by a street light (R. 22-23, 103, 125). Durham saw petitioner walk a few feet to a nearby tree, pick up a small package, return to the open right front door of the Cadillac, make a motion as if to deposit the package therein, and then wave to John Doe and walk away (R. 23, 106-111). Bryson, peeping from the slightly raised lid of the Cadillac trunk, saw petitioner pick up the package near the tree and return to the Cadillac (R. 147).

Durham, seeing petitioner walk away, went immediately to the Cadillac and recovered a package from the floor (R. 24). He called to Bryson to come out of the trunk (R. 113) and then walked down the street in time to see petitioner reenter the Pontiac and ride away (R. 24-25). A field test of the package indicated that it contained narcotics (R. 26-27).

Shortly thereafter, at about 12:25 a.m. (R. 148), the four officers, still accompanied by John Doe, arrested petitioner at his residence, taking him in one car, and Doe in another, to the Narcotics Bureau (R. 32-39). There was testimony that Doe remained in the custody of the police overnight (R. 185).

Throughout the cross-examination of these government witnesses, repeated objections to persistent questions by counsel for petitioner as to the identity of John Doe were sustained (R. 63, 64, 97, 167, 170, 185, 204, 205). Government counsel based his objections to such questions on the ground that, prior to trial, the court had ruled that the government need not reveal the identity of the informant, and that to do so would make his services valueless to the government in other cases (R. 60-61).

Further, in cross-examination, counsel for petitioner questioned witness Durham about an alleged conversation[3] that took place in the police interrogation room when petitioner was confronted with Doe (R. 80-81). The court reserved its decision as to whether such evidence was prop-

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[3] The evidence would have been that Durham heard John Doe say that he did not know petitioner. Counsel for the government, on redirect examination, established that Durham had seen petitioner with Doe previously, arguing, against a motion to strike, that petitioner's counsel had, through his cross-examination, put the fact of Doe's acquaintance with petitioner in issue (R. 81-84).

erly admissible (R. 42), later striking it from the record (R. 84). However, when counsel for petitioner later cross-examined Bryson, he inquired at some length about the conversation in the interrogation room, without objection from government counsel or interruption by the court (R. 153-154). He concluded by asking (R. 153-154):

> Q. Well did he [John Doe] say anything with reference to an acquaintance or any prior association with this man?
>
> A. Yes. In the presence of the Defendant, to make the Defendant—
>
> Q. Forget your purpose, now. What did he say?
>
> A. Well, he said he didn't know the Defendant here. He said he had never seen him before.
>
> Q. That was the John Doe that was sitting in the front seat of the Cadillac?
>
> A. Yes, sir.

Upon redirect examination, government counsel established that Bryson had seen petitioner meet Doe on a previous occasion (R. 165). Over objection, the court allowed the testimony to stand (R. 166).

2. The package which had been found in the car was turned over by Durham to Bryson (R. 39, 75) and then to Fields in the Narcotics Bureau interrogation room (R. 40). When analyzed, it was found to contain heroin (R. 46).

An envelope into which the heroin had been placed after seizure and examination was introduced into evidence as Exhibit 6 (R. 216). Entries made in ink upon the face of the envelope include the name and address of petitioner and a description of the contents. Opposite the printed words "How obtained" the printed words "Purchased by" are crossed out in ink, and after the printed words "Found by" there appears a notation in the handwriting of agent Fields, "Officer James L. Bryson." After the printed words "Where obtained" it is noted "74th & St. Lawrence Ave., Chicago, Illinois." The date is noted as August 12, 1954, and the time as 11:15 p.m. Opposite the printed words "Amount Paid," there is an entry "None." The names of four officers appear as witnesses, and the agent reporting the case is shown as Durham. The reverse side of the envelope, bearing the initials of Fields and Durham, indicates that the heroin was weighed and sealed by Fields while witnessed by Durham on August 13, 1954.

On cross-examination, Durham conceded that the notation on the envelope (Exhibit 6) as to how the heroin was obtained was inconsistent with his testimony, but explained that it was error on the part of Fields (R. 75-76). Fields stated that the information which he noted on the envelope was given to him by Durham on August 13th (R. 201). Fields further said that he did not consider

Exhibit 6 an "official" Government report. He said there were other reports written by Durham with regard to the transaction but that he did not know whether they were consistent with the information given him by Durham as noted on the envelope (R. 206). At this point petitioner's counsel requested that the "official" report be produced. The court sustained an objection to the request (R. 209-210).

At the conclusion of the government's case petitioner called no witnesses (R. 214) but moved for a judgment of acquittal which was denied (R. 213).

Upon appeal, petitioner asserted that the trial court committed error in denying the motion for a bill of particulars and in limiting cross examination as to the identity of John Doe, and in denying his request for the production of the report of agent Durham (Pet. App. 1a-2a). The Court of Appeals affirmed the conviction, holding that it was not necessary to decide whether John Doe was an active participant in the offense of sale charged in count 1 so as to entitle petitioner to full disclosure of Doe's identity, inasmuch as guilt under count 2 was sufficient to support the sentence, it being undisputed that John Doe was not a participant in the illegal possession on which that charge was based (Pet. App. 2a-3a). The court further found no error or abuse of discretion on the part of the trial court in denying the motion

for production of the report, holding that there was no sufficient showing of its materiality (Pet. App. 3a-5a).

ARGUMENT

1. Petitioner contends that the trial court erred in upholding the right of the government to nondisclosure of the identity of John Doe. He argues that Doe was an active participant in the illegal activity charged and that therefore the government could not withhold identity of an informant under the rule established by *Sorrentino* v. *United States,* 163 F. 2d 627 (C.A. 9); *United States* v. *Conforti,* 200 F. 2d 365 (C.A. 7); and *Portomene* v. *United States,* 221 F. 2d 582 (C.A. 5).

While we do not question the rule of those cases, we believe that, as the court below held, the conviction on count 2, based on illegal possession, may properly be upheld since the identity of the informant has no real bearing on that charge in the circumstances of this case. Since the sentences on both counts were to run concurrently, count 2 alone will support the verdict. *Hirabayashi* v. *United States,* 320 U.S. 81; 85; *Pinkerton* v. *United States,* 328 U.S. 640.

The naming of the informant could not add to or detract from the evidence as to *possession.* Both Durham and Bryson saw petitioner go to a tree, pick up a package, and carry it back to the Cadillac in which he had been riding (R. 23, 106-111, 147). Both were positive of their identification;

each had seen petitioner before (R. 5, 82-83, 135, 165); each was watching from a short distance (R. 20-23, 147) on a clear night in a well-lighted area (R. 22-23, 103, 125). The package, when analyzed, was found to contain heroin (R. 46). And petitioner's possession and carriage of the package was *prima facie* evidence of his guilt under count 2 and left him with the burden (which he declined to meet) of proving that he possessed the narcotics lawfully. *United States* v. *Li Fat Tong*, 152 F. 2d 650, 652 (C.A. 2); *United States* v. *Feinberg*, 123 F. 2d 425 (C.A. 7), certiorari denied, 315 U.S. 801.[4]

John Doe's identity was not material to petitioner's defense—the test laid down by the *Sorrentino*, *Conforti* and *Portomene* cases, *supra*—unless petitioner was seriously contesting the testimony that *he* was present and participated in the transaction. But there was no such issue at the trial, and no real attempt to present a defense of mistaken identity. Petitioner now makes much of the testimony as to John Doe's statement when confronted with petitioner in the police interrogation room (most of which was stricken from the

[4] The government was under no duty to bring in as witnesses all persons who had some knowledge of the illegal activity. Further, no inference (of testimony unfavorable to to the government) can be drawn from the failure of the government to call Doe as a witness because the reason why he was not called (to protect his status as an informant) was reiterated time and time again.

record) that he did not know petitioner and had never seen him before. It is evident, however, that that statement was made to conceal from petitioner the fact that Doe was an informant, as part of a general pretense, to protect the informant and his continued use to the government. This is borne out by the evidence that the informant was kept in custody overnight (so as to make it appear he was genuinely arrested) and by the testimony which shows that Bryson, when he attempted to say *why* Doe denied knowing petitioner, was prevented from doing so by petitioner's counsel (see p. 7; *supra*). As noted above, the police had observed petitioner before the meeting in question and were positive in their identification. No defense seriously put forward by petitioner (who called no witnesses, *supra*, p. 9) required knowledge of Doe's identity or even suggested that such information would really be pertinent or helpful to the defense.

Under these circumstances, while we agree that the identity of an informant who is an active participant (or whose identity is otherwise material to the defense) should normally be disclosed, we believe that the failure to do so in this case cannot be deemed error requiring reversal of the conviction. See *Sorrentino* v. *United States*, 163 F. 2d 627, 629, *supra*, in which, although setting forth the general rule, the court held that in the facts of that case—showing that disclosure was unnecessary—non-disclosure did not require reversal. In

the analogous situation of production of official reports or memoranda made by a government witness, the rule is that a defendant cannot engage in a "fishing expedition" but must lay a proper foundation for such compulsory production by showing substantial reasons for believing that the documents will be pertinent. *Gordon* v. *United States,* 344 U.S. 414, 418-419; *Goldman* v. *United States,* 316 U.S. 129. No such showing was made here.

2. There is also no merit in petitioner's contention that the trial court committed error in refusing his request for the production of Durham's report to the Narcotics Bureau. The basis of the request was that the envelope in which the narcotics were put for safekeeping bore a notation, made by Fields who was not present at the time the package was found, that Bryson found the narcotics, whereas the testimony was that Durham first found the package in the car (with Bryson at the scene), then turned it over to Bryson, and then to Fields (See the Statement, *supra,* pp. 7-9).

The variance between the notation on the envelope and the more detailed testimony of the agents on the stand was immaterial, since Bryson and Durham were working together at the time the package was found. The slight discrepancy was fully explained by the fact that the notation was made by Fields who obtained the package the next day. Whether one agent or the other first

laid hands on the package did not affect their crucial and consistent testimony as to seeing petitioner take the package from a tree and bring it to the car. The court below was therefore correct in holding that, in contradistinction to *Gordon* v. *United States,* 344 U.S. 414, *supra,* there was in the instant case no sufficient showing that the document requested contained evidence material and relevant to the issues.

The trial judge is allowed wide discretion in the matter of compelling production of documents of this type. Under the circumstances, there was no abuse of discretion here. *Goldman* v. *United States,* 316 U.S. 129, 132.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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